FORMOSA RESORT PROPERTIES SDN BHD A

v.

BANK BUMIPUTRA MALAYSIA BHD

COURT OF APPEAL, PUTRAJAYA B
SURIYADI HALIM OMAR JCA
ZAINUN ALI JCA
SULAIMAN DAUD JCA
[CIVIL APPEAL NO: M-02-223-2007]
23 FEBRUARY 2009 C

BANKING: *Cheques - Forged cheques - Customer claimed reimbursement for unauthorised drawn cheques - Whether forgery proved on a balance of probabilities*

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The appellant had an account with a branch of the respondent bank in Melaka. The appellant alleged that 67 cheques drawn from its account were forged and so unauthorised and that the respondent was indebted to the appellant in the sum of RM411,024.70 withdrawn in total. The trial judge, although concluding that there were variations in the signatures of the alleged forged cheques to that of the signatures of the alleged valid cheques ('P73'), was not satisfied that forgery was conclusively proved, and surmised that there was every possibility that the alleged forged signatures were genuine but signed differently. The appellant's claim was therefore dismissed on the ground that it failed to prove its case. The appellant now appealed and the issue was whether the appellant had proved forgery on a balance of probabilities. E F

Held (dismissing the appeal with costs)
Per Suriyadi Halim Omar JCA delivering the judgment of the court: G

(1) A bank was inexorably bound by a duty of care towards an account holder and had to ensure that it acted within its mandate. On the other hand, even though customers more often than not have escaped responsibility in forged signature cases, it was not in every case that they were exonerated of liability. Liability would be based on a case by case basis. (para 17) H

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(2) When a customer opened a current account with the bank, an understanding was struck with the bank with each party respectively bound by a duty of care. Both parties had obligations and any breach thenceforth would subject the wrongdoer to certain legal sanctions. (paras 18 & 19)

(3) Apart from filling the bank application form, a customer invariably completed a specimen signature card from which verification of a customer's signature might be made. With the paper work now completed the customer's account became operable and transactions might be carried out. In the present case, with the account being a current account, cheques would be a necessary vehicle to operate it. Cheques, being bills of exchange drawn on a banker, became payable on demand and operated as a mandate or order to the bank to pay and debit the account of its customer. That being so, on receipt of any cheque, the bank must promptly meet the demand of that cheque as it was obliged to honour it. It was not uncommon in certain circumstances that the odd forged cheque might slip the sharp eyes of bank officers, as in the present case, resulting in losses to customers. (para 20)

(4) The appellant failed to compare and contrast the signatures on the alleged forged cheques with the signature on the specimen signature card or the signature on the bank application form. The appellant instead, in order to establish the forgery, merely compared the alleged forged cheques with P73. P73 was also never compared with the specimen signature card kept with the respondent. The appellant's approach to establish the cheques as being forged by making comparison with P73 was not conclusive. It was a methodology that was totally unacceptable and misguided. To sideline the specimen signature card or the bank application form was disastrous for the appellant. (paras 21 & 22)

(5) The appellant as the asserting party failed to establish the fact that the signatures in the 67 cheques were forged. The respondent was not fettered with any responsibility to prove otherwise. It followed that the appellant failed to prove its case on a balance of probability. (para 23)

Bahasa Malaysia *Translation Of Headnotes*

Perayu mempunyai akaun dengan sebuah cawangan bank responden di Melaka. Perayu mendakwa bahawa sebanyak 67 cek yang dikeluarkan atas akaun tersebut adalah palsu dan tidak dikeluarkan olehnya, yang berakibat responden telah menanggung hutang kepadanya sebanyak RM411,024.70, iaitu jumlah keseluruhan yang dikeluarkan. Hakim bicara mendapati terdapat beberapa variasi pada tandatangan di dalam cek-cek yang dikatakan dipalsukan berbanding dengan cek-cek yang dikatakan sah ('P73'), namun tidak berpuashati bahawa pemalsuan telah dibuktikan dengan konklusifnya. Hakim bicara juga menduga bahawa terdapat kemungkinan bahawa tandatangan yang dikatakan palsu itu sebenarnya tulen tetapi ditandatangani dengan cara yang berbeza. Tuntutan perayu dengan itu telah ditolak atas alasan bahawa perayu gagal membuktikan kesnya. Perayu merayu dan isunya adalah sama ada perayu telah membuktikan pemalsuan atas imbangan kebarangkalian.

Diputuskan (menolak rayuan dengan kos)
Suriyadi Halim Omar HMR menyampaikan penghakiman mahkamah:

(1) Sesebuah bank tidak dapat tidak adalah terikat dengan tanggungjawab untuk berhati-hati terhadap seseorang pemegang akaun dan perlu mempastikan bahawa ia sentiasa bertindak selaras dengan mandatnya. Di sebalik itu, walaupun pelanggan-pelanggan sering terlepas dari tanggungjawab dalam kes-kes pemalsuan tandatangan, mereka tidaklah terlepas dalam semua dan setiap kes. Penentuan tanggungan dibuat berdasarkan kepada setiap satu kes.

(2) Bilamana seorang pelanggan membuka satu akaun dengan bank, satu kesefahaman telah dijalin dengan bank di mana masing-masing pihak memikul tanggungjawab untuk berhati-hati. Kedua-dua pihak memikul obligasi mereka masing-masing dan setiap pelanggaran akan mentertaklukkan si pembuat salah kepada peruntukan undang-undang.

(3) Selain dari mengisi borang permohonan kosong, seseorang pelanggan semestinya perlu juga menyempurnakan kad tandatangan contoh dari mana pengesahan tandatangannya mungkin boleh dibuat. Setelah segala dokumentasi disempurnakan, maka barulah akaun tersebut boleh beroperasi dan transaksi-

transaksi boleh dilakukan. Dalam kes di sini, memandangkan akaun adalah akaun semasa, cek adalah satu keperluan bagi operasinya. Cek, sebagai suatu bil pertukaran yang dikeluarkan terhadap banker, adalah boleh dibayar di atas tuntutan dan bertindak sebagai mandat atau perintah kepada bank untuk membayar dan mendebit akaun pelanggannya. Oleh hal yang demikian, sebaik menerima mana-mana cek, bank perlu dengan segera memenuhi tuntutan cek tersebut kerana itu memang merupakan obligasinya. Dalam keadaan-keadaan tertentu, bukanlah sesuatu yang ganjil bahawa cek palsu mungkin turut terlepas pandang oleh mata tajam pegawai-pegawai bank, seperti yang berlaku di sini, sekaligus menyebabkan berlakunya kerugian.

(4) Perayu gagal untuk membanding dan membezakan tandatangan-tandatangan di atas cek-cek yang dikatakan palsu dengan tandatangan di atas kad tandatangan contoh atau di borang permohonan bank. Sebaliknya, bagi membuktikan pemalsuan, perayu hanya membandingkan cek-cek yang dikatakan palsu dengan P73. P73 juga tidak pernah dibandingkan dengan kad tandatangan contoh yang disimpan dengan responden. Pendekatan perayu untuk membuktikan cek-cek telah dipalsukan dengan cara membandingkan dengan P73 adalah tidak konklusif. Ia suatu kaedah yang langsung tidak dapat diterima dan tersasar. Mengenepikan tandatangan contoh atau borang permohonan bank adalah satu bencana buat perayu.

(5) Perayu sebagai pihak yang menuntut gagal membuktikan fakta bahawa tandatangan-tandatangan di dalam 67 cek adalah palsu. Responden tidak memikul apa-apa tanggungjawab untuk membuktikan sebaliknya. Ianya mengikut bahawa perayu gagal membuktikan kesnya atas imbangan kebarangkalian.

Case(s) referred to:

Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors [2006] 3 CLJ 1 FC ***(refd)***

Boonsom Boonyanit v. Adorna Properties Sdn Bhd [1997] 3 CLJ 17 CA ***(refd)***

Commissioners of Taxation v. English, Scottish and Australian Bank Ltd [1920] AC 683 ***(refd)***

Doe D. Devine v. Wilson [1855] 14 ER 581 ***(refd)***

Dr Shanmuganathan v. Periasamy Sithambaram Pillai [1997] 2 CLJ 153 FC ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

London Joint Stock Bank, Limited v. Macmillan and Arthur [1918] AC 777 A
PP v. Mohamed Kassim Yatim [1976] 1 LNS 105 HC ***(refd)***
Syarikat Islamiyah v. Bank Bumiputra Malaysia Bhd [1988] 1 LNS 78 HC ***(refd)***
The Great Western Railway Co v. The London and County Banking Co Ltd [1901] AC 414 ***(refd)***
United Dominions Trust Ltd v. Kirkwood [1966] 2 QB 43 ***(refd)*** B

Other source(s) referred to:
Harcharan Singh Tara, *Examination of Handwriting and Signatures,* [1995] 3 MLJ 1
Poh Chu Chai, *Banking Law,* p 99 C

For the appellant - Chew Wee Kian; M/s HS Chew & Co
For the respondent - Wong Hor Mun; M/s Azim, Tunku Farik & Wong

[Appeal from High Court, Melaka; Civil Suit No: 22-333-1999]

[Editor's note: For the High Court judgment, please see Formosa Resort Properties Sdn Bhd v. Bank Bumiputera Malaysia Berhad [2007] 1 LNS 686.] D

Reported by Usha Thiagarajah

E

JUDGMENT

Suriyadi Halim Omar JCA:

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[1] This appeal was heard by this panel and was unanimously dismissed with costs.

[2] The plaintiff company (hereinafter referred to as the appellant), is a private company incorporated in Malaysia under the Companies Act and at the material time was a customer of the G respondent. The respondent is and was at all material times a banker, carrying on its business at a branch office in Melaka. The appellant had an account at the said branch with the respondent. Between the period of 27 November 1993 until 3 October 1995, the respondent paid out various sums of money in respect of various H cheques amounting to RM414,024.70 payable to the bearer, and had debited the account belonging to the appellant. 68 pieces of cheques (P3-P70) were involved altogether. The appellant alleged that it did not draw those cheques or authorise the drawing of those cheques and thereafter through its solicitors claimed that abovementioned I sum from the respondent.

[3] At the commencement of the trial the appellant withdrew its claim in regard to cheque number 757318 dated 27 November 1993 for the sum of RM3,000 conceding that the claim for that sum to be time barred. Therefore the claim before us was only for 67 cheques totalling RM411,024.70.

[4] As per the statement of claim the appellant pleaded that the cheques were issued by one Vong Ai Foon and one Ong Swee Hoe, as representatives of the appellant. The respondent should know that the cheques were forged by Vong Ai Foon or by an unknown person. On that premise the respondent was without any authority to pay out or debit the account of the appellant and hence liable to refund the debited sum to the appellant.

[5] At the High Court stage parties agreed that the issues to be revolved were these questions:

i. whether the respondent honouring the 67 cheques which were the subject matter of the action in the sum of RM411,024.70 was in breach of its mandate;

ii. whether the said 67 cheques were signed and or countersigned by one Ong Ah Sim @ Ong Swee Hoe or other authorised signatories; and

iii. whether the respondent was indebted to the appellant with the above sum.

[6] Come the hearing date before us, parties agreed that the pertinent issue to be determined by the court was whether the 67 cheques were forged, and if so whether the appellant was entitled to be reimbursed.

[7] Whether the appellant is entitled to be reimbursed very much depends on whether at the material time, it was a customer of the respondent in the legal sense. A permanent relationship with a bank, like having an account in it, as in this case obviously qualifies (*Commissioners of Taxation v. English, Scottish and Australian Bank Ltd* [1920] AC 683; *The Great Western Railway Co. v. The London and County Banking Co. Ltd* [1901] AC 414). Once the respondent is a customer certain rights will rise between it and the bank, in the like of the bank ensuring customer's confidentiality and exercising care when carrying out instructions etc.

[8] Sifting through past cases banks have not been successful in asserting that a customer is under a duty of care to take precaution in preventing the forgery of signature. With few defences available to banks on this issue, needless to say if the forgery is not proved, then the appellant's case must be dismissed. As stated above, the appellant had alleged that they were either forged by one Vong Ai Foon, an account's clerk of the appellant, and who at the material time controlled the appellant's cheque books, or by some unknown person. At the material time, the 67 cheques of the appellant required at least two authorised signatures from any two of the following persons *viz.* from one Ong Ah Sim @ Ong Swee Hoe, Vong Ai Foon, Lim Moi Cheng or Ong Keng Swee. Ong Ah Sim died in 2002. To establish its case the appellant called two witnesses namely PW1 and PW2.

[9] PW1, a forensic analyst in his report stated that all the 67 cheques differed with the specimen signatures (P73) given to him for analysis. PW2, a director with the appellant from 1993 to 1996, and one of the signatories of the cheques testified that the specimen signatures were the signatures of Ong Ah Sim. PW2 alleged that the signatures of Ong Ah Sim @ Ong Swee Hoe on the 67 cheques were forged. He alleged that in the circumstances of the case, the respondent had no authority to pay the said cheques or to debit its account and thus held the respondent liable to repay the amount of the said cheques.

[10] The respondent's witness, DW1 in his testimony stated that he had verified the signatures on the cheques with the specimen signature card, and verified further by the manager whenever there were insufficient funds in the account. He also testified that Vong Ai Foon did not go all the time to the bank alone. On various occasions (RR 142) she accompanied Ong Ah Sim who frequently cashed the cheques. In a nutshell Ong Ah Sim was a frequent visitor at the respondent's bank. Compounded by the evidence of PW2 that he met Ong Ah Sim at the bank (RR123) when the latter was encashing the cheques, merely raises further doubt as to the implausibility that the payment of the cheques were not mandated. In fact if fraud had been committed, if indeed fraud had been perpetrated, and with the cheques in their hands, Ong Ah Sim or PW2 would have discovered it at the bank.

[11] After hearing evidence from the witnesses, the court held that the appellant had failed to prove its case and therefore dismissed the claim with costs.

[12] The learned judge critically went through the evidence, in particular every specimen signature and the 67 cheques alleged forged, by making his own observation and assessing the signatures of Ong Ah Sim's signature. On appraisal he found that the signatures in P73 were not similar, constant or consistent. In fact the signatures were subject to variations. The signatures alleged not to be that of Ong Ah Sim on the 67 cheques were also not similar, constant or consistent. The court was aware that the conclusions arrived at by PW1 were premised only on slight variations regarding the signature of Ong Ah Sim on the cheques, what with there being similarities between the signatures in the specimen cheques and the 67 cheques. A serious question thus had arisen as to the assertion that they were forged. The learned judge at the conclusion of the hearing thus was not satisfied that the signatures of Ong Ah Sim on the cheques were conclusively proved as forged, and surmised that there was every possibility that the alleged forged signatures were genuine but signed differently. He had demonstrably appreciated the evidence and supplied cogent reasons why he arrived at his factual finding. He could not be said to have been plainly wrong (*Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309).

[13] As regards his rejection of some of the evidence of PW1, the learned judge did not act outside his purview. He may accept the evidence of the expert but only if satisfied after making his own observation that it is safe to accept that expert opinion (*Dr Shanmuganathan v. Periasamy s/o Sithambaram Pillai* [1997] 2 CLJ 153). Further, in *PP v. Mohamed Kassim Yatim* [1976] 1 LNS 105, Hashim Yeop Sani had said:

> Evidence of experts can never go beyond an opinion and can never therefore be of absolute certainly. It has always been accepted that evidence especially of handwriting can never be conclusive. But the proper way to assess the evidence in this case would be to see whether the court could act on such evidence if there was corroboration either by direct evidence or circumstantial evidence. It is only with such approach that a proper decision can be arrived at.

[14] On the reason why a signatory signed differently, Harcharan Singh Tara, the former Director General of Chemistry Department Malaysia, in an article entitled *"Examination of Handwriting and Signatures"* [1995] 3 MLJ 1 had made the following observation:

> It is not uncommon for a person to deliberately modify his signature for a specific purpose, and then disclaim it at a future date to get an advantage.

[15] The learned judge further opined that it was unreasonable to expect the appellant not to know of the forgeries, and that monies were withdrawn without authority, when altogether 67 cheques had been encashed in a span of two years. If it were true that the cheques were forged, surely Ong Ah Sim would know, as he went either alone or together with Vong Ai Fong to withdraw the monies from the bank. Their physical presence and conduct at the bank as representatives of the appellant surely would not raise any alarm bell to the respondent bearing in mind that they have been adhering to this *modus operandi* for two years.

[16] Vong Ai Foon who had been entrusted with the cheques and the authority to sign them, seemed to have absolute freedom to issue cheques as she liked, with or without Ong Ah Sim peering over her shoulders. Now, the appellant wants to blame the respondent for the loss. Who then is to be blamed here?

[17] It is our view that a bank is inexorably bound by a duty of care towards an account holder and has to ensure that it acts within its mandate. On the other hand, even though customers more often than not have escaped responsibility in forged signature cases, it is not in every case that they are exonerated of liability. Liability will be based on a case by case basis. In *Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors* [2006] 3 CLJ 1, from the aspect of the bank, the Federal Court decided that a bank owed a contractual duty of care in carrying out a customer's instructions. In *London Joint Stock Bank, Limited v. Macmillan and Arthur,* [1918] AC 777, though not a forgery case, the customer had neglected all precautions and merely signed the cheque but leaving blank the space where the amount should have been. The court held that if a customer signs a cheque in blank and leaves it to a clerk or other person to fill it up, he is bound by the instrument as filled by his agent and thus allowed the appeal. In the course of it the court remarked:

> In my judgment, there was a clear breach of the duty which the customer owed to the banker. It is true that the customer implicitly trusted the clerk to whom he handed the document in this state to fill it up and to collect the amount, but his confidence in the clerk cannot excuse his neglect of his duty to the banker to use ordinary care as to the manner in which the cheque was drawn, he owes that duty to the banker as regards the cheque, and it is no excuse for neglecting it that he had absolute and, as it turned out, unfounded confidence in the clerk. The duty is not a duty to have clerks whom the customer believes to be honest. It is specific duty as to the preparation of the order upon the banker. *If the customer chooses to dispense with ordinary precautions because he has complete faith in his clerk's honesty, he cannot claim to throw upon the banker the loss which results.* No one can be certain of preventing forgery, but it is a very simple thing in drawing a cheque to take reasonable and ordinary precautions against forgery. *If owing to the neglect of such precautions it is put into the power of any dishonest person to increase the amount by forgery, the customer must bear the loss as between himself and the banker* (emphasis added).

[18] The grounds supplied by the learned judge apart, for dismissing the appellant's case, we now would like to supplement them with additional reasons. It is no secret that at the initial stage, when a customer opens a current account in any bank, he will invariably file some application form, and thereafter after signing it deposits a certain amount of money. Unless the deposit requirement is complied with, chances are the application will fail. By all reckoning when a customer opens that current account an understanding is struck with the bank with each party respectively bound by certain duty of care (*Banking Law* by Poh Chu Chai p. 99). The latter author at p. 7 had occasion to state:

> When a customer deposits money with a bank, the relationship arising is one of creditor and debtor, with the bank becoming liable to pay the money deposited when demanded by the customer (*Kian Lup Construction v. Hongkong Bank Malaysia Bhd* [2002] 7 CLJ 32).

[19] Both parties have obligations thenceforth, and any breach of their respective obligations may subject the wrongdoer to certain legal sanctions.

[20] Apart from filing the application form a customer invariably completes a specimen signature card, from which verification of a customer's signature may be made. With the paper work now

completed the customer's account becomes operable and transactions may be carried out. In relation to this case, with the account being a current account, cheques will be the necessary vehicle to operate it. Cheques are bills of exchange drawn on a banker, payable on demand and operates as a mandate or order to the drawee bank to pay and debit the account of its customer, the drawer. That being so, on receipt of any cheque, aside from a sensible business point of view, the bank must promptly meet the demand of that cheque as it is obliged to honour it (*United Dominions Trust Ltd v. Kirkwood* [1966] 2 QB 43). It is not uncommon in certain circumstances that the odd forged cheques may slip the sharp eyes of bank officers as in this case, resulting in losses to customers.

[21] We now return to the mainstream and highlight the obvious weakness of the appellant's case. From the notes of proceedings it was obvious that the appellant had failed to compare and contrast the signatures on the cheques, with the signature on the signature specimen card or at worst the signature on the application form. The appellant instead, in order to establish the forgeries, had merely compared the cheques with the 24 other specimen cheques (P73), but never with the signature specimen card. In the course of the proceedings PW1 openly admitted that P73 was also never compared with the specimen signature cards kept in the bank. He testified that those specimen cheques were supplied by Messrs Shearn Delamore primarily to determine the authorship of the cheques. Yet no evidence was adduced to establish the background of these specimen cheques. About the only important finding that came out of this comparison was that, as testified by this forensic document analyst, the makers of the 24 specimen cheques and the 67 cheques were different people as gleaned from the differences in the writing form and movement (RR72). But this finding still did not prove that the signatures on the 67 cheques were forged.

[22] The appellant here is only required to establish, on a balance of probability that the signatures on the 67 cheques were forged, in that they were not that of Ong Ah Sim @ Ong Swee Hoe. Who signed them is actually not central to the issue before us. To establish that the signatures on the cheques were not of Ong Ah Sim, comparison by necessity must be made with genuine signatures. How better to arrive at a conclusive finding, if not by comparing the signatures on the 67 cheques, with the specimen signature card of Ong Swee Hoe kept by the respondent when

processing the account? It will indisputably establish that the signatures are similar or not with the specimen signature card and finally deciding on the action. The existence of this signature specimen card was confirmed by DW1 in the course of his evidence. Apart from that specimen signature card the appellant could also have subpoenaed an officer from the respondent's bank to produce the application forms, which will show the signature of Ong Swee Hoe. For some unfathomable reason this was not done. We were therefore satisfied that the appellant's approach to establish the cheques as forged, by making comparison with P73, and by no means conclusive, was a methodology that was totally unacceptable and misguided. To totally sideline the specimen signature card or the application form was disastrous for the appellant.

[23] It is trite in civil cases that he who asserts must prove, and here the appellant is the asserting party. For purposes of our appeal, as the appellant has alleged that the signatures in the 67 cheques are forgeries the onus thus lie on it to establish that fact (*Syarikat Islamiyah v. Bank Bumiputra Malaysia Bhd* [1988] 1 LNS 78). The respondent is not fettered with any responsibility that it must prove that the signatures on the 67 cheques were that of Ong Ah Sim @ Ong Swee Hoe. Sifting through the evidence adduced by the appellant by no stretch of the imagination has PW1 or PW2, or the combined effect of their evidence sufficiently proved that the cheques were forged. On that premise the appellant had failed to prove its case on a balance of probability (*Doe D. Devine v. Wilson* [1855] 14 ER 581; *Boonsom Boonyanit v. Adorna Properties* [1997] 3 CLJ 17).

[24] Based on the above reasons we had no hesitation in dismissing the appeal with costs. The order of the High Court was affirmed and the deposit was ordered towards account of taxed costs.